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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 291

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY PETITIONER,

vs.

MACK SAXON, ANCILLARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE IN TEXAS OF THE ESTATE OF J. W. MOORE, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF FOR THE PETITIONER

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(No. 36,105)

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STATEMENT

The case of Mack Saxon, Ancillary Administrator and Personal Representative in Texas of the Estate of J. W. Moore, Deceased, Plaintiff in Error, v. Atchi-

son, Topeka & Santa Fe Railway Company, Defendant in Error, was decided by the Supreme Court of the State of Texas on March 4, 1931. The opinion has not been officially reported, but may be found in 36 S. W. (2d) 228, and on Motion for a Rehearing, which was overruled May 20, 1931, 38 S. W. (2d) 775. It is here on Writ of Certiorari issued to that court on October 26, 1931. Overruling of the motion for rehearing in said court constituted final judgment entered in the Supreme Court of Texas.

Admittedly all questions involved in this cause arise under the Federal Employers' Liability Act, Ch. 149, 35th Stat. 65. The case is ruled by that Act, and the principles of the common law as applied in the Courts of the United States, and thereunder the plaintiff may not recover in the absence of negligence on the part of the defendant; A. T. & S. F. Ry. v. Toops, 281 U. S. 351; Patton v T. & P. Ry. Co., 179 U. S. 658. If upon examination of the record it is found that as a matter of law the evidence is not sufficient to sustain the judgment, it will be reversed; C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472; Atlantic Coast Line v. Davis, 279 U. S. 34; Toledo, St. L. & W. Ry. v. Allen, 276 U. S. 165.

Certiorari may be granted under Rule 38 of this Court, Paragraph A, Sec. 5,

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with the applicable decisions of this Court."

This action was prosecuted to judgment in the District Court of El Paso County, Texas by Mack Saxon, Ancillary Administrator and Personal Representative in Texas of the Estate of J. W. Moore, Deceased. The evidence discloses that J. W. Moore, was a brakeman in the service of petitioner on a freight train running between Vaughn and Clovis, in the State of New Mexico, and was entirely familiar with the duties of his position, as well as with the road itself. He was killed at Tolar, New Mexico, on the morning of February 15, 1927, while both he and petitioner were engaged in interstate commerce. The freight train in question was running west. On reaching Tolar, deceased opened a switch so that this freight train could take the siding to admit passage of an east bound passenger train. Deceased, as head brakeman, had been riding on the engine, as was the custom, and just before alighting to throw this switch it was agreed between him and the fireman in effect that the fireman would open the outgoing switch and that Moore would inspect the train as it passed, looking for hot boxes, stuck brakes, etc. (R. 58). There were 110 cars in the train. The train passed into the siding, and as the engine passed Moore he undertook to throw his flag into the gangway (R.64), picked it up and started walking down the passageway between the side-track and main line, westward. No member of the crew saw him again alive. A teamster saw him running along, and make two or more attempts as though he wanted to get on the cars as they went by, and Moore passed out of his sight (R.47). The body was found between the two tracks, badly mangled.

There was blood on the wheels of the thirty-fourth car from the engine (R. 68), as well as on the rail at a point about ten feet west of what plaintiffs described as a low place in the walkway (R. 47). None of the members of the train crew expected Moore to undertake to get on the cars as the train was passing through the siding (R. 64)..

Three photographs showing the tracks and passageway appear in the transcript between pages 78 and 79.

At the conclusion of the evidence defendant made motion for judgment for the reason the evidence did not indicate that the accident was the result of negligence on the part of the defendant; that it failed to indicate how the accident happened; that the burden was on the plaintiff to establish the facts making up his cause of action, which burden had not been met. The motion was overruled (R. 24). Defendant likewise requested the Court to charge the jury to find in favor of the defendant, which was refused (R. 25). Cause was submitted to the jury on what is known as special issues. The following questions were propounded:

"Question No. 1: Do you find from a preponderance of the evidence that, at the time and place alleged by the plaintiff, there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff? Answer yes or no.

"If you answer the preceding question in the affirmative, then answer:

"Question No. 2: Do you find from a preponderance of the evidence that the deceased, J W Moore, was running along the track as alleged by plain-

tiff, and that while doing so and attempting to board one of the cars with which he was working, he stepped on or upon such a soft area or hole, if any, and was thereby caused to fall and be injured, as alleged by plaintiff?

"If you answer Question No. 1. in the affirmative, then answer:

"Question No. 3: Do you find from a preponderance of the evidence that the presence of such soft area or hole, if any, was due to the negligence of the defendant?

"You are charged that it is the duty of the defendant to use ordinary care to provide a reasonably safe place for its employees to work, and a failure to use such care would be negligence.

"If you answer the preceding question in the affirmative, then answer:

"Question No. 4: Was such negligence, if any, a proximate cause of the accident and injury to the deceased, J. W. Moore?

"Question No. 5: Did the deceased, J. W. Moore, know of such soft area or hole, if any, or by the use of ordinary care, incident to his employment, would he have known of such soft area or hole?

"If you answer the preceding question in the negative, then answer:

"Question No. 6: Do you find that the accident or injury to the deceased, complained of, was due to some other of the risks of the employment assumed by the deceased?

"Question No. 7: What sum do you find, if paid now, would reasonably compensate the widow and

children of the deceased for the damages sustained by them?" (R. 19-20.)

The defendant objected to the submission of the issues for the same reasons that were made basis of its motion for judgment (R. 22-23).

The jury answered the first four questions "yes", the fifth and sixth "No" and No. 7, "$15,000.00".

The defendant filed motion for judgment after verdict was returned on the ground, among others, that the evidence was wholly inadequate to show how or in what manner deceased met his death; that there was no evidence indicating what caused the accident (R. 28). This motion was overruled, and judgment entered on April 18, 1929, in accordance with the findings of the jury (R. 29-31).

Petitioner filed its motion for a new trial, based, among others, on the ground made basis of motion for judgment (R. 31-35). The motion was overruled, and appeal taken by petitioner to the Court of Civil Appeals, Eighth Supreme Judicial District of Texas (R. 36).

The Court of Civil Appeals, Eighth Supreme Judicial District of Texas, sustained the contention of petitioner and, on October 24, 1929, reversed and rendered the judgment in favor of petitioner, 21 S. W. (2nd) 686.

The Supreme Court of Texas granted a Writ of Error and, as previously shown, on March 4, 1931, reversed the judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, and af-

firmed the judgment of the District Court of El Paso County, Texas, and, on May 20, 1931, overruled Petitioner's motion for re-hearing (R. 122).

SPECIFICATIONS OF ERROR

Petitioner avers that the Supreme Court of Texas decided a federal question of substance erroneously, and not in accordance with applicable decisions of this Court in the following particulars:

First: In holding that the evidence was sufficient to sustain the jury's finding of negligence on the part of the defendant, and to support the verdict and judgment.

Second: Because the verdict and judgment are based wholly upon speculation and conjecture as to how the deceased met his death, and not on any facts from which the legal conclusion could be drawn that the railway company was liable.

Third: The judgment of the Supreme Court of Texas affirming that of the District Court of El Paso County is at most based upon a possibility, to reach which it is necessary to indulge more than one presumption, which is wholly insufficient to fix a liability under the Federal Employer's Liability Act and principles of the common law as applied in the Supreme Court of the United States.

ARGUMENT

We presented in our Petition for Certiorari the evidence under which this cause was submitted to the jury,

and which evidence was by the Supreme Court of Texas held sufficient to warrant the recovery awarded. The evidence bearing upon the issue submitted is brief, and in order that the Court may readily analyze the same, we quote:

C. E. Mahon testified:

> "On the 15th day of February, 1927, I was loading some gravel at Tolar, New Mexico, for the Telephone Company over at Portales, New Mexico. I was loading it into one of those red coal cars, a railroad coal car. I remember the occasion of J. W. Moore being killed there at Tolar. At the time he was killed, I was coming up the highway there with a load of gravel. I seen the freight train as it was pulling into the siding and I seen Mr. Moore. At that time I was on the highway coming in with that load of gravel. I was going east and the train was going west. When I first saw Mr. Moore, he was running along by the side of the train and he just reached up like he was going to catch on, but he didn't raise himself off the ground, the best I could see he didn't catch it. He caught at it but didn't catch it. When I first saw him make the motion as though he was getting on the train, it looked like it was something like about three car lengths behind the engine. When I first saw him make that motion with his hands, he was right west of the east end of the switch there, just west of the crossing (Referring to Ex. "A"). This is a crossing, and the first time I seen him he was right in just west of this crossing. After making his first motion while he was running along by the side of the train about the third car, he con-

tinued to run along with the train. The train was outrunning him. Then I seen him make another attempt, that is, reach like he was going to catch again. That was the same kind of reaching as before, but I never did see him raise himself off the ground. He made the same kind of motion toward the car as before. Then he was out of my sight. He was running the last time I saw him and went out of my sight. I never seen him any more after he went out of my sight until he was killed. I know approximately where the place is my son pointed out to me where he saw a footprint in a soft place, I know about where it is. I know where Mr. Moore was killed, I went there after he was killed. I saw the place where he was killed under the train and know where that place is. Where my son said this hole was, the last time I seen Mr. Moore, he was east of this hole, but he was killed west of where this hole was. I suppose he passed over that place after he went out of my sight and before he was killed, he was west of this hole when he was killed and he was east of it when I saw him go out of my sight. Oh, it must have been something like maybe fifty or sixty feet, in my best judgment, from the place he went out of my sight to the place he was killed. It must have been something like eight or ten feet, possibly twelve, not so very far, from the place he was killed back to the place where this footprint was. * * * * * * When I first saw Mr. Moore he was something like fifty feet west of this crossing, going down here, and I guess it is something like four hundred feet from the crossing to the depot. I could see him until he got behind these here cars, and

as soon as he passed the depot and the cars I could see him again. I was loading a car of gravel the day of the accident and there were two coal cars standing on that track. It is called a house track. I could see Mr. Moore, you see, from here (indicating fifty feet west of crossing) until just before he got to the depot, those cars extended a little east of the depot, and after he passed west of the depot I could see him a little ways until the coal bin obstructed the view. Then I didn't see him any more until after the accident. The wind was blowing that day, and the smoke was kind of rolling over and settling down by the side of the train right smart. I didn't pay any particular attention to this train, I see freight trains coming in every day, that was a common thing. * * * * * * I stated that it was about fifty feet, something like that, from the place Mr. Moore went out of my sight to the place he was killed. I arrived at my opinion as to the place he was killed by the blood I saw on the rail. It was all on the inside of the rail, there was blood all along the rail there. I didn't see him when he got killed, but I saw the place where the blood was on the track, and that is what I was speaking of with reference to the distances a while ago." (R. 46-51.)

Leonard Mahon testified:

"I was living at Tolar when Mr. Moore was killed. I remember the occasion of his being killed there, I was going to school at that time. I didn't see this accident when it happened, I were at school at the time, but I went down to the place that day. I went there because I

heard about it and I just wanted to go down and see. First, I went with Irvin Smith, and later, after noon, I went with the school children. I saw the signs on the track down there where the blood was, where Mr. Moore was supposed to have been killed. It was probably two hours after the accident when I first went down there. I saw a soft place in the pathway over which the brakemen run. It was three feet wide, probably, and four or five feet long, and it was along the siding track. It was just east of the west house track switch. It was a hole filled in with cinders or soft substances, and hadn't been packed down. I saw a footprint in that hole, it was pointed west, it was the left foot. I saw a footprint of the left foot, going west. What first attracted my attention to this soft place was that I stepped in it myself, and that called my attention to it. There was just one footprint. The footprint that I saw in there was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest. That hole or soft place was six or eight feet, maybe ten feet, east of the place where Mr. Moore was killed. * * * * *

I recognize this picture (Ex. "A") as being the station at Tolar. That looks like it, taken from the east side, and you are looking west, the same way this train is supposed to have been going. The place that I call a soft place was in between the main line track and this passing track. It was the other side of the depot, on the west side of the depot. This other picture (Ex. "B") is a picture looking from the other direction. The soft place was near here, right along in

there (pointing out on picture). It extended out about three feet from the track, the passing track, and was four or five feet long. It was small rock screenings. This looks about like the ground in between those two tracks. This picture is about a correct representation of what was there. I saw some blood on the rail, and that was on further west than the place where the screenings were, some six, eight or ten feet. I saw a footprint, but I don't know who it was that had stepped in there. I was down there about two hours after the accident, it was not three hours. I was down there just after twelve o'clock. I don't know that there were other people walking up and down there between the time of the accident and the time I got down, they said there were. Mr. Traylor and my father were, but I don't know, I wasn't there. I don't know how many people walked up and down between the time of the accident and the time I got down there." (R. 51-52.)

Irvin Smith testified:

"I remember the time that Mr. Moore, a brakeman, was killed there at Tolar. I live at Tolar. At that time I was going to school at Taiban, but I wasn't at school that day. I went down to the place where this accident happened with Leonard Mahon and I saw the blood signs of where Mr. Moore was killed on the passing track. There was a soft place probably eight or ten feet before he was killed — eight or ten east of where he was killed. My attention was first called to that place when Leonard stepped one foot in it, and called my attention to it. After Leonard called my attention

to it, I saw one noticeable footprint in the hole. The footprint was going west. I stepped in the soft place myself. Compared to the footprint that I made and the one Leonard made, the footprint in there was a heavier one. It was a man's footprint. The front part was the deepest. It was the left foot." (R. 52-53.)

R. O. Robinson, a photographer, testified:

"These are the pictures I took (Exs. "A", "B" and "C') and turned over to the Railway Company. They correctly represent the situation there. I had pointed out to me the place where the blood is still showing where Mr. Moore was killed. I saw that place, the blood is still showing. I also saw a hole or depression in the pathway there, used by brakemen, close to that place. I had that pointed out to me by the agent, Mr. Traylor. It wasn't exactly a hole, it was just a little bit lower than the surrounding ground, not very much lower, but a little lower It was possibly some six or eight feet long, I judge,—I might not be correct, but something near that, and possibly three feet wide. It was just a little bit lower than the other ground surrounding it, the same color ground and everything, but just a little bit lower and softer than the surrounding ground. I stepped in it to see how much it would give. As to whether or not it did give sufficiently to cause a man to lose his balance who was running,—I will say that in my opinion, it might cause a man to stumble who was running and it might not, depending upon circumstances, in my opinion, whether a man knew it was there or didn't know it was there or was looking where he was step-

ping. If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment. That hole was right in the pathway. There was a pathway there, it was well beaten. It was the same color, but you could tell it was worn out. That pathway was close to the track." (R. 54.)

H. C. Delaney, fireman on the freight train in question, testified, in effect, that when they reached the switch the train came to a stop. Moore threw the switch and the train went into the siding; that there were 110 cars in the train; the track is down grade in the direction the freight train was going.

"Brakeman Moore was riding the engine at the time we stopped to go on the passing track. I had an understanding with him as to what I was to do. He was to get off and line the switch for the passing track, and if anything should happen, he would flag No. 22; we would pull on in to the passing track, and if he didn't come over the head end, didn't get up at the time No. 22 cleared, I was to line the switch at the west end, going out on the main line, after No. 22 cleared. I was going to line the switch for him. I don't know of any occasion for him to try to get on that train at all, in view of the conversation I had with him there. I wasn't expecting him to get on the train. That conversation was in the presence of the engineer, it was on the engine, but I doubt very much if he could hear, Mr. Moore was on my side. I was not expecting brakeman Moore to try to get on that train at all. It was my purpose to line the switch in order to get back on the main line. It

> is the duty of the head brakeman to open switches for the engine. It is usual and customary, where the head brakeman expects to line the switch, for him to ride on the engine for that purpose, or catch a few cars back, they sometimes do that, but they ride the head end of the train. That is the usual and customary way of doing it. I was not expecting him to line this switch at all. He was going to flag No. 22 in case anything happened, if it didn't, he was going to let the train pull by, inspect the train as we pulled in, and come to the head end, he said if he didn't, he would come at Taiban." (R. 58.)

The testimony of the fireman and other members of the train crew indicates that the train proceeded down the siding at a speed of about ten or twelve miles per hour.

C. A. Crista, the engineer on the freight train said:

> "It was the purpose of my train, as soon as the passenger train passed, to have the switch lined and get back on the main line. Mr. Moore informed me, just before arriving at heading-in-switch at Tolar, that he would stay at the heading-in, or about the heading-in, switch, and allow the train to pull by in order, if there were any brakes sticking, wheels sliding or journals running hot, to find it out and notify me by putting out caboose semaphores as we pulled train through passing track, and close heading-out switch. He informed me that fireman Delaney volunteered to open heading-out switch, that is, the switch we would go out through when we left Tolar. He told me that the fireman would do that service for him. In view of that under-

standing had there with brakeman Moore, I did not expect him to try to get on the freight train at all going through the switch. If it had been his purpose to line the switch going out of Tolar, it is usual and customary for him to get on the engine and ride down. He didn't do it on this occasion and I didn't expect him to, from what he said. It was the understanding he was not going to. So I didn't expect him to try to get on the train at all. He was going to stand there and watch the train as it went by. Brakeman Moore was standing inside the passing track about the clearance post between the passing track and main line, as I came by. He was standing there at my last view of him, probably a few cars west of the station, that is, while I was west of the station. At that time I closed throttle, causing smoke to come from locomotive and whip down on train to where my view was obscured of all sight back on the right side of train. I couldn't see for the smoke, I could see nothing. As I came by on locomotive, brakeman Moore had flag rolled upon the staff and made an attempt to pitch flag in the deck of the locomotive. I mean he threw the flag up to the deck, but the flag struck the engine steps and was knocked back on ground just about brakeman Moore's feet. He reached down and picked up flag and was standing with flag staff in hand, facing train, looking at the train, at my last view of him." (R. 64-65.)

W. J. Smith, the conductor on the freight train testified that the Car R. F. D. 13476 was the thirty-fourth car back from the engine, and there was evidence of

blood on the wheels. That he saw no blood on any other car. (R. 68).

John L. Mayhall, the rear brakeman on the freight train, testified that he went to the scene of the accident, that there were other people walking up and down there that morning, several different people walked up and down there (R. 73).

Admittedly, the passenger train No. 22 stopped on flag at this station to pick up the remains of Moore. It was agreed that the freight train in question was employed at the time of the accident handling interstate commerce; that there were cars of freight in that train which had originated at points outside of the State of New Mexico, and were destined to points beyond the state, and that the cause, if any, arose under the Federal Employers' Liability Act (R. 56). There was considerable evidence on collateral issues, but as it had no relevancy to the questions submitted and, indeed, has no bearing on the cause at this time, reference is not made to any of the same.

Thus, a cause is presented wherein a freight train was required to take a siding, and the head brakeman had an understanding with the fireman that after he had lined the switch for the passing track he would watch from the ground the cars as they went through the siding and flag the oncoming passenger train if need be, and the fireman was to throw the outgoing switch, and that he, the brakeman, would come over the train to the engine at the next station. The brakeman Moore did line the incoming switch, was seen on the

ground by the engineer in passing. The engine crew did not expect him to undertake to get on the train in going through the siding, he had no duty to perform thereon, and there was no occasion for him to do other than stand in the passageway and watch the cars as they went by and, finally, take passage on the caboose. No member of the train crew saw the accident, and of course, none of them know how it happened. Deceased was seen, however, running along the ground by the side of the train, going in the same direction with it, making two or more efforts as though he intended to get on the car. He passed out of sight of this man. It appears from plaintiff's cause, which must be here accepted, that there was a low place in the ground along the route traveled by deceased. The print of a left shoe is seen. The body of deceased is found at a point about ten feet west of the shoe print. This, we say, is plaintiff's case. It is thought to be a fair summary, and the Supreme Court of Texas has held that it was sufficient to warrant an inference of negligence on the part of the railway company making it liable to the representatives of deceased.

The print in the ground referred to was not discovered for more than two hours after the accident, and in the meantime several people had walked up and down that same path. There is no evidence indicating the kind, character or size of shoe worn by deceased. No one undertakes to testify as to what deceased was doing at the time he was killed. Admittedly, as we believe, he had no business on that train at that time. He was presumed, and indeed had agreed that he

would, stay on the ground and watch the cars as they went by. It is, of course, evident that in some way he fell under the train. There was no evidence indicating that he had stumbled, no marks on the ground indicating that he had lost his balance. The only thing was the print of one shoe, which could just as well have been made by one of several others as by him. Admittedly there was no occasion for him to flag the oncoming passenger train.

We submit:

> *First:* THERE WAS NO EVIDENCE TO SHOW THAT THE NEGLIGENT ACT FOUND BY THE JURY WAS THE PROXIMATE CAUSE OF THE DEATH OF MOORE.
>
> *Second:* A RECOVERY F[illegible]NDED UPON SURMISE OR CONJECTURE WILL NOT BE UPHELD.

These two propositions are more or less dependent the one upon the other, and we predicate our case upon not only the correctness of the propositions, but the applicability of the same when here applied as well.

The statement of plaintiff in his petition making the ground work of the action is thus phrased:

> "It became and was the duty of the deceased, J. W. Moore, to do and perform the duties usually and customarily performed by brakemen in such service, which duties, among other things, required deceased to get off and on the cars constituting the train while the same were in motion, the same being customarily done by

> brakemen in such service, and while engaged in the performance of his work and the discharge of his duties on the siding, switching or passing track at Tolar, New Mexico, *and while attempting to board the train for the purpose of flagging an oncoming passenger train on the main line,* he was caused to fall under said train and sustain serious injuries which resulted immediately in his death." (R.14.)

That it is necessary for a plaintiff in an action of this character to affirmatively establish the material allegations of his petition is axiomatic, hence it was necessary in this cause for the plaintiff to establish, among others, the averment above, and that this may not be done by building one presumption upon another is firmly established.

As said in our Petition for Certiorari, the only facts really established by this record are:

> (a) Deceased was an employee of the defendant, an interstate carrier engaged in interstate commerce at the time of the accident;
>
> (b) He was killed while engaging in that service.

and aside from these facts it is respectfully submitted that the rest of the cause depends upon conjecture. In other words, *the evidence does not show what caused the death of Moore,* and this we believe to be fatal to any right of recovery under the Federal Employers' Liability Act.

The Court had occasion in the rather recent case A. T. & S. F. Ry. Co. v Toops, 281 U. S. 351, to consider

this question. A conductor was killed while the crew was engaged in a switching operation. There were no eye witnesses. It appeared that deceased knew that the cars were to be kicked on to an elevator track, and had said that he would look out for them. The body was found under the engine tender diagonally across the elevator track. Train book was found lying in the center of the track, between the rails. The surface of the track showed that his body, after it had fallen to the ground, had been moved or dragged westward two or three feet until his shoulders were jammed against the derail. The theory of respondent was that deceased, while crossing the track near the derail where, according to some of the testimony, the roadbed was overgrown with weeds and so thinly ballasted that the track had become skeletonized, was knocked down by the leading grain car, and that his death was attributed to negligence in carrying out the kicking movement without signal and without placing a flagman or having a light on them, but what actually took place could only be surmised. Whether he was run down on the track by the first car, or whether he attempted unsuccessfully to board the train on one side or the other, or succeeded and, in either case, finally came to his death by falling under or between the moving cars, was a matter of guess work, and, speaking through Mr. Justice Stone, the Court said:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The

jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658; *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367, 371; *St. Louis & San Francisco Ry. Co. v. Mills*, 271 U. S. 344, 347; *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472; *New York Central Railroad Co. v. Ambrose*, 280 U. S. 486.

"Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death. * * * * * * If allowed to sustain the verdict it would remove trial by jury from the realm of probability based on evidence to that of surmise and conjecture."

C. M. & St. P. Ry. v. Coogan, 271 U. S. 472,—this was a death case,—no eye witnesses, —and same was based upon circumstantial evidence. Deceased was a rear brakeman of the road crew. The train had been made up. The accident happened before the train was ready to start. It seems caboose had been kicked and was stopped by deceased, who rode and controlled it by handbrakes. There were other switching operations of other cars. Finally, the engine was stopped to discover whether a coupling had been made. It was found that it had, and the engine moved all cars east about two car lengths. The switch engine was detached, the road engine came and was coupled to the cars, air-hose

was coupled between engine and first car. It was found that the air-hose was open at some other place. The brakeman of the switch crew walked east along the south side of the train to couple the hose at the east end of the last cut, and while going towards the rear found the body of deceased. It was near the west end of the second car from caboose, lying parallel with the track. There were indications on the ground sufficient to show that he had been between the rails of the track, and that he had been run over by the east truck of the car next to the caboose. The evidence tended to support respondent's contention that it was the duty of the deceased to couple the air-hose, and that prior to the accident all couplings had been made except that made by the brakeman of the switch crew, and the one at the caboose. Respondent relied upon the following: that about twelve inches south of the south rail, and fastened to the ties by clamps and spikes, there was an air pipe line extending about 800 feet. A stretch of pipe line about fifteen feet in length, was bent three or four inches towards the rail and upward, leaving a space of some 3½ to 4 inches between it and the ties. It had been in that condition for some months. The evidence seemed to be sufficient to warrant a finding that there was a breach of duty in this respect. The shoe worn by deceased at the time of the accident was in evidence. The outside of the counter of the left shoe was scratched, and showed a marked rounding depression parallel with the sole, and just above the heel. This was first noticed some days after the accident. In the meantime the shoe had been left in a garage. Respon-

dent's theory was that when the switch engine stopped after the last coupling deceased went between the caboose and car to couple the air-hose, that he stepped between the rail with his right foot leaving his left foot outside the south rail and between it and the pipe line; that stooping to reach the air hose his left foot slipped backward under the bent pipe, that before he had time to make the coupling the cars were started backward in the movement to clear the switch. That when he attempted to straighten up the left shoe was caught under the pipe, and he was forced backward, run over and killed. The Court there had, among others, the question as to whether the evidence indicated that the condition of the pipe caused or contributed to cause the death of deceased. Circumstantial evidence was relied upon. The Court, speaking through Mr. Justice Butler, said:

> "The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This Court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of the death, judgment against the carrier will be reversed. * * * * * * It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As there is

no direct evidence, it is necessary to determine wehther the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. *United States v. Ross*, 92 U. S. 281, 284; *Manning v. Insurance Co.*, 100 U. S. 693, 698. Assuming it was the duty of deceased to couple the air hose, it was necessary for him to go between the cars to do so. He was standing by the caboose when the first cut came in. The air hose coupling might have been made then or at any time after that. It was not made, and it is left to be inferred that he postponed effort in that direction until after all the switching had been done, and until the engine had hold of the string of cars. And then it must be inferred that he went between the cars in the manner claimed — his right foot between the rails leaving his left foot outside where, it is argued, it was caught under the bent pipe.

"The 'rounding depression' on the counter of the shoe is not sufficient to bridge the hiatus in the evidence. It is not shown when or how that depression was made. The condition of the shoe before the accident is not disclosed. A number of days elapsed before it was noticed; and it is not shown that in the meantime care was taken to keep it in the same condition or that the depression was not made after the accident. Even if the appearance of the shoe and other circumstances are sufficient to justify an inference that the depression might have been made by the bent pipe, it cannot be said that they constitute any reasonable support for a finding that it was so made. And, assuming that

the depresssion on the shoe counter was made by contact with the bent pipe, there is nothing to indicate whether it was made at the time deceased was knocked down or later while he was being dragged, But there is nothing to show that the pipe had any connection with the accident. The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. One between cars coupling the air-hose is very liable to be run over if the train is unexpectedly moved. A finding that his foot was not caught under the pipe is quite as consistent with the evidence as a finding that it was.

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. *Baltimore & Ohio R. R. Co. v. Groeger,* 266 U. S. 521, 524. When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough."

It is noted that again the Court announces that "whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed", and this rule, in our judgment, is fatal to plaintiff's cause here. What proof is there that the print in the passageway was made by

deceased, and what was he attempting to do at the time? If surmise is permissible, it would be far more reasonable to presume that deceased fell from a car, or in an effort to climb a car, than to presume that he lost his balance on the ground and fell under the train. If he fell while walking or running, presumably he fell directly forward, and not under a car,—while if he fell from the side of a car, the accident was more likely to result. There is no evidence indicating which of these things, or any other, occurred. The point we make is that plaintiff failed in the effort to show how deceased was killed and what he was doing at the time, and it was necessary that this be shown by satisfactory evidence before a court can determine whether or not it was the result of actionable negligence on the part of petitioner.

If plaintiff's theory as averred in his petition is true, then, among others, it may be said that deceased had no duty to perform on the train, was not expected to make that attempt, and, if he did, it was purely a voluntary act and not in line with anything he was called upon to perform at the time and place.

As bearing directly upon the question just discussed, involving more than one theory as to how an accident could have happened, we refer to Patton v. T. & P. Ry. Co., 179 U. S., at page 663:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. *Texas & Pacific*

> *Railway v. Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Applying the rule there announced, it is necessary to guess between several theories as to what caused the death of Moore. The only fact established along this line is that Moore was killed, and the body was found at a given place. And to say that this is sufficient to warrant recovery is contrary to the adjudicated cases called to our attention.

In Missouri Pacific Railway Co. v. Aeby, 275 U. S. 426, the Court held that there is no liability in the absense of negligence on the part of the carrier, and that fault or negligence on the part of a railroad company

may not be inferred from the mere fact that an employe fell and was hurt.

The same rule is substantially announced in Atlantic Coast Line v. Davis, 279 U. S. 34.

K. C. S. Ry. v. Jones, 276 U. S. 303 was an action for the death of a car inspector. No one saw the death. The body was found between the main track and a parallel track, and the probability was that deceased was killed by a train going north on the former. A freight train was being made up on the parallel track. The theory of the respondent was that deceased was engaged in inspecting cars, and so absorbed in his work that he did not hear the approaching train, but was relying upon the ringing of the bell, which usually was rung, but which witnesses say was not rung in this case. Deceased was seen not later than a quarter before seven in the evening. The train passed five minutes after seven. Body was found twenty-five minutes after seven. The indications were that there was nothing for him to inspect at the probable time of his death, and the Court speaking through Mr. Justice Holmes, said:

> "Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself."

The Supreme Court of Texas in its original opinion said:

> "It is true that the evidence shows, as found by the Court of Civil Appeals, that deceased intended to get on the train, but we are unable

> to find any evidence in the record, and none has been pointed out to us, showing as a matter of law that he actually made the attempt, that is, that he actually caught hold of the train. On the other hand, there is circumstantial evidence to, in law, support a fact finding that he was caused to stumble and fall under the train by stepping into the hole or soft place in the pathway along the side of the track and in which pathway he was running. This issue was fairly presented to the jury and found as above stated." (R. 116.)

And on motion for rehearing practically the same thing was stated, and this added:

> "Nor can it be said that the inference of taking hold of and falling from the train was equally as warranted as the finding made by the jury."

We submit that the conclusion so reached is not founded upon any evidence in the record, and that it is necessary to make a guess, and if guessing is to be indulged, why may we not say that deceased fell from the car, because when last seen his movement indicated that he wanted to get on the car. His action indicated an attempt. But the fatal answer to all of this is that the evidence does not indicate with reasonable certainty, with that certainty required, what caused the death.

It is perfectly plain that there are at least two theories, and because there are two theories the action is condemned, as said by this Court in the Patton and other cases.

The analysis as made by the Court of Civil Appeals in its judgment denying the recovery is more in accord with the rule announced in the cited cases. We quote:

> "It is only a surmise that the deceased stepped on the soft place. Somebody did, but who or when, is not made to appear. Even if it be conceded that the deceased stepped on the soft area there is nothing to indicate that it caused him to fall. The evidence shows one clean impression of one foot, as one running would make, but no indication at or beyond the footprint by any impression on the ground that the soft ground caused the one running to fall. The nearest to it was by the witness Robinson who said that in his opinion 'it might cause a man to stumble who was running and it might not', depending on the circumstances stated. There is no evidence on the ground of a stumble.
>
> "It is not made to appear that had the deceased, while running where the footprint was seen, fallen by stepping in the soft ground, he would necessarily or even probably have fallen under the train." (R. 87.) 21 S. W. (2d) 686.

The statements of fact appearing therein accord with the evidence, and from which it would seem to follow that there is such an hiatus, such a failure in plaintiff's case, as to justify and require a finding in favor of petitioner. If deceased fell from a car there is a want of negligence, and assumed risk would also bar recovery; Boldt v. Pennsylvania R. R. Co., 245 U. S. 441; Chesapeake & Ohio Ry. v. Nixon, 271 U. S. 218.

It is respectfully submitted that the view of this case presented by the Court of Civil Appeals of the Eighth

Supreme Judicial District of Texas is correct, and should not have been disturbed by the Supreme Court. We, therefore, respectfully ask that the judgment of the Supreme Court of Texas be reversed.

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